SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 699

BEATRICE L. GOLDSTONE AND EUGENE L. BONDY, EXECUTORS OF THE ESTATE OF MORRIS L. GOLDSTONE, DECEASED, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 20, 1945.

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BEATRICE L. GOLDSTONE and EUGENE L. BONDY, Executors of the Estate of Morris L. Goldstone, Deceased, Plaintiffs-Appellants,

against

THE UNITED STATES OF AMERICA, Defendant-Respondent

STATEMENT UNDER RULE 13

This action was commenced in the United States District Court for the Southern District of New York by service of a summons and complaint on March 27th, 1942.

The names of the parties appear in full above. No change has taken place in the parties or attorneys since the commencement of the action.

The answer was served on or about June 2nd, 1942.

The defendant was not arrested, no bail was taken and no property was attached or arrested. A trial was had before Hon. Stephen W. Brennan, District Judge, on the 17th day of March, 1943. No questions were referred to a Commissioner or Commissioners, Master or Referee.

Final judgment was entered on September 24th, 1943. Notice of appeal was served and filed on October 7th, 1943, and the appeal allowed on the same day.

[fol. 2] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BEATRICE L. GOLDSTONE and EUGENE L. BONDY, Executors of the Estate of Morris L. Goldstone, Deceased, Plaintiffs,

v.

THE UNITED STATES OF AMERICA, Defendant

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Bondy & Schloss, plaintiff's attorneys, whose address is

285 Madison Avenue, New York City, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

George J. H. Follmer, Clerk of Court. (Seal of Court).

Dated: New York, March 27, 1942.

[fol. 3] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

(Same Title)

COMPLAINT

The plaintiffs, by their attorneys, Bondy & Schloss, complain of the defendant and allege:

1. On the 23rd day of February, 1938, Morris L. Goldstone died a resident of the Village of Larchmont, County of Westchester, State of New York, within the 14th Internal Revenue District of the State of New York.

2. On the 2nd day of March, 1938, the Last Will and Testament of the said Morris L. Goldstone was duly admitted to probate in the Court of the Surrogate of Westchester County, State of New York, and to the plaintiffs above named Letters Testamentary were duly issued thereon. The said plaintiffs have duly qualified as executors thereunder and have at all times since been and still are acting as such executors.

3. An estate tax return was duly filed by these plaintiffs as executors of the said estate pursuant to Chapter 3 of Title 26 of the Code of Laws of the United States of America and such proceedings were had thereon that a tax was assessed against the said estate, and paid by the plaintiffs above named to the Collector of the 14th Internal Revenue District of the State of New York on behalf of defendant in the sum of One Hundred twenty-six thousand three hundred ninety-nine ($126,399.11) and 11/100 Dollars; and that defendant received and has the same.

[fol. 4] 4. Upon information and belief, of the said tax assessed and paid as aforesaid Five Thousand Three Hundred seventy-six ($5,376.11) and 11/100 Dollars with interest thereon from May 23, 1939, was erroneously and illegally assessed and collected by the defendant from the plaintiffs above named on the 18th day of December, 1940, and the plaintiffs above named paid the same to the defendant under protest.

5. Thereafter and on or about the 14th day of January, 1941, the plaintiffs above named did duly file with the said Collector of Internal Revenue on Form 843 of the Treasury Department of the United States a claim for refund of the said tax erroneously and illegally assessed and collected; and the said claim was rejected on or about the 14th day of February, 1941.

6. These plaintiffs show that the said tax was erroneously and illegally assessed and collected for the following reasons:

(a) On June 28, 1933, the Equitable Life Assurance Society of the United States entered into two contracts, one No. 9,168,545, by which, in consideration of the sum of Fourteen thousand three hundred fifty-seven ($14,357.08) and 08/100 Dollars then paid to it, it insured the life of the said decedent, Morris L. Gold--tone, in the sum of Eighteen thousand nine hundred twenty-eight ($18,928.00) Dollars, the said benefit to be payable upon the death of the Insured to the wife of the Insured, Beatrice L. Goldstone, if living, or to the Insured's two daughters, Dora and Betty Goldstone in equal shares, or to their survivor, if the said wife should not be living; and by the second of which, No. 9,168,544, the Insurer agreed to pay, in consideration of Twelve thousand one hundred forty-two $12,- [fol. 5] 142.92) and 92/100 Dollars then paid to it, a semi-annual annuity of Three hundred eighty-six ($386.51) and 51/100 Dollars to the said decedent during his lifetime and the sum of Six thousand seventy-one ($6,071.46) and 46/100 Dollars to his said wife, Beatrice L. Goldstone, upon his death, if she should survive him, or to his daughters, Dora and Betty Goldstone, in equal shares of their survivor, if his said wife should not survive him.

(b) At its issue the ownership of contract No. 9,168,545 was stated to be, was and continued to be in the said Beatrice L. Goldstone absolutely with right in her, at any time, and without the consent of the said Morris L. Goldstone or of any other person, to exercise any or all of the following rights with respect to the said contract: to receive or elect the disposal of any dividends declared thereon; to borrow up to the full loan value of the contract at any time pursuant to the terms thereof; to assign, pledge or transfer the said contract; to surrender the said contract to the Insurer at any time after it should have been in force for one year, and to receive, collect and possess the cash surrender value thereof; to change the beneficiary named therein; to alter the plan of insurance; excepting only that if the said Beatrice L. Goldstone should fail to surrender the said contract and collect the cash surrender value thereof during her lifetime or to assign or otherwise alienate the same, and should the said Morris L. Goldstone survive her, then ownership of the said policy, in its then value, should vest in the said Morris L. Goldstone.

(c) At the issue of contract No. 9,168,544, the same provided that the purchaser thereof was the said Beatrice L. Goldstone who might, without the consent of the said Morris L. Goldstone or any other person, [fol. 6] exercise any or all of the following rights with respect to the said contract; surrender the same to the Equitable Life Assurance Society at any date upon which an annuity payment should be due and upon such surrender receive the cash surrender value in an amount equal to the death benefit therein provided for; surrender, assign or pledge the contract and all rights thereunder or change the same to any other form or plan of contract; assign the said contract in such manner as to foreclose and exclude any rights of any beneficiary thereunder or of the said Morris L. Goldstone; receive any dividends declared upon the said contract and elect any option with respect thereto; borrow the full loan value upon the said contract; change the beneficiary under the said contract; provided only that if the said Beatrice L. Goldstone should

not during her lifetime have surrendered, assigned or otherwise alienated the said contract, then, if the said Morris L. Goldstone should survive her, all property and rights therein should vest in him.

(d) By reason of the fact that full ownership, rights, power of extinguishment and disposition of the said contracts resided solely in the said Beatrice L. Goldstone from the inception thereof, and as part of the terms thereof, and that any rights which the decedent Morris L. Goldstone might have acquired therein in the future would not have resulted from a reverter but from a voluntary grant thereof by the failure of the said Beatrice L. Goldstone to dispose of the said properties absolutely during her lifetime, neither of the said contracts nor the proceeds thereof were a part of the taxable estate of the said Morris L. Goldstone at the time of his death.

(e) The erroneous and illegal assessment hereinbefore alleged resulted from the finding by the defend- [fol. 7] ant that the proceeds of the said two contracts were a part of the taxable estate of the said decedent Morris L. Goldstone at the time of his death.

(f) The wife of the said Morris L. Goldstone, Beatrice L. Goldstone, referred to in this paragraph, survived the said Morris L. Goldstone.

7. Although due claim has been made as aforesaid and due demand made for a refund of the said erroneous and illegal assessment and collection, together with interest thereon, no part thereof has been paid.

8. There is therefore now due and owing by the defendant to the plaintiffs by reason of the premises the sum of Five Thousand three hundred seventy-six ($5,376.11) and 11/100 Dollars with interest thereon from the 23rd day of May, 1939.

Wherefore these plaintiffs demand judgment against the defendant in the said sum of Five thousand three hundred seventy-six ($5,376.11) and 11/100 Dollars with

interest thereon from the 23rd day of May, 1939, together with costs and disbursements of this action.

Bondy & Schloss, Attorneys for Plaintiffs, Office & P. O. Address, 285 Madison Avenue, Borough of Manhattan, New York City.

[fol. 8] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Same title]

ANSWER

The defendant, by its attorney, Mathias F. Correa, United States Attorney for the Southern District of New York, answering the complaint in this action:

1. Denies each and every allegation contained in paragraph "3" of the complaint, except that it admits that the plaintiffs, as Executors of the Estate of the decedent Morris L. Goldstone, filed an estate Tax return and paid taxes with respect to the said estate in an aggregate amount, including interest, of $126,399.11.

2. Denies each and every allegation contained in paragraph "4" of the complaint.

3. Denies each and every allegation contained in paragraph "5" of the complaint, except that it admits that on January 14, 1941, the plaintiffs filed with the Collector of Internal Revenue for the Fourteenth Revenue District of New York a claim for refund of the amount of $5,376.11, with interest from May 23, 1939, and that notice of rejection of the claim by the Commissioner of Internal Revenue was given the plaintiff by letter dated February 14, 1941.

4. Denies each and every allegation contained in paragraph "6" of the complaint, except that it admits that on June 28, 1933, the decedent entered into two contracts with the Equitable Life Assurance Society of the United States, numbered 9,168,544 and 9,168,545, and that the decedent's wife, Beatrice L. Goldstone, survived the decedent.

[fol. 9] 5. Denies each and every allegation contained in paragraphs "7" and "8" of the complaint, except that it

admits that no part of the sum of $5,376.11 claimed as a refund, has been refunded to the plaintiffs.

Wherefore defendant prays for judgment against the plaintiffs, dismissing the complaint, together with the costs and disbursements of this action.

Dated: New York, N. Y., May 28, 1942.

Mathias F. Correa, United States Attorney for the Southern District of New York, Attorney for Defendant. By: Dolores C. Faconti, Assistant United States Attorney, Office & Post Office Address: United States Court House, Foley Square, New York, N. Y.

[fol. 10] In United States District Court, Southern District of New York

[Same title]

Stipulation of Facts

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the following facts are conceded to be true and this stipulation may be offered and received in evidence as proof of the facts therein set forth, with the same force and effect as if independent proof were taken in respect thereto. This stipulation shall be without prejudice to the right of either party to object to the materiality of said facts and the exhibits annexed hereto or to introduce other and further evidence not inconsistent with the facts herein stipulated.

1. This is an action of a civil nature arising under the internal revenue laws of the United States instituted by the plaintiffs pursuant to Section 3772 of the Internal Revenue Code to recover the sum of $5,376.11 constituting a portion of the amount of federal estate tax and interest paid to the Collector of the Fourteenth Internal Revenue District of the State of New York on behalf of the defendant upon an assessment against the estate of Morris L. Goldstone, deceased, under Section 302 of the Revenue Act of 1926, as amended. The plaintiffs allege and the defendant denies that said taxes were erroneously and illegally as-

sessed against plaintiffs and were wrongfully and illegally collected on behalf of the defendant.

2. Morris L. Goldstone died testate on February 23, 1938, and letters testamentary were duly issued out of the [fol. 11] Surrogate's Court of Westchester County, State of New York, to the plaintiffs herein.

3. Thereafter and on or about May 20, 1939, the plaintiffs filed with the Collector of Internal Revenue for the Fourteenth District of the State of New York an estate tax return in connection with the estate of Morris L. Goldstone, deceased, disclosing an estate tax liability of $93,549.41. Said sum was paid on the date last mentioned.

4. Thereafter and in or about December, 1940, Eugene L. Bondy, one of the executors of the estate of the above-named decedent, signed a waiver of restrictions against the immediate assessment and collection of a deficiency in federal estate tax of $30,053.49. On December 4, 1940, plaintiffs paid to the Collector of Internal Revenue for the Fourteenth District of New York, on behalf of the defendant herein, said sum of $30,053.49, together with interest of $2,796.21.

5. Thereafter and on or about January 14, 1941, plaintiffs duly filed with the said Collector of Internal Revenue on Form 843 of the Treasury Department of the United States a claim for the refund of $5,376.11, with interest, comprising a portion of the deficiency tax assessment hereinabove indicated. The grounds upon which said claim for refund was predicated are contained in a rider attached to the claim. A photostatic copy of the claim for refund is annexed hereto, marked Exhibit "A" and incorporated herein by reference.

6. The facts upon which plaintiffs rely in their assertion that there was an erroneous and illegal assessment and collection of deficiency in estate tax are set forth in the following paragraphs.

[fol. 12] 7. On June 29, 1933, The Equitable Life Assurance Society of the United States entered into a contract bearing number 9168543, by which it insured the life of the late Morris L. Goldstone in the sum of $18,928, in consideration of the issuance of a check in the sum of $14,357.08

by the decedent to said company. On July 27, 1933, the contract aforesaid was rewritten without substantial change. A photostatic copy thereof is annexed hereto, marked Exhibit "B" and incorporated herein by reference.

8. On June 29, 1933, and simultaneously with the execution of contract numbered 9168545, The Equitable Life Assurance Society of the United States entered into another contract, bearing number 9168544, by which it agreed, among other things, to pay a semi-annual annuity of $386.51 to the late Morris L. Goldstone during his lifetime, in consideration of the issuance of a check in the amount of $12,142.92 by the decedent to said insurance company. Said contract was rewritten on August 17, 1933, but no substantial changes were made. A copy thereof is annexed hereto, marked Exhibit "C", and is incorporated herein by reference.

9. The insurance company aforesaid did not require a physical examination of the decedent preliminary to the execution of contract number 9168545, Exhibit "B", but accepted policy numbered 9168544, Exhibit "C", in lieu thereof.

10. At the time of the said demise of Morris L. Goldstone neither of the contracts hereinbefore described had been assigned by Beatrice L. Goldstone, and were still in full force and effect. No loans or charges of any kind whatsoever had been made or placed against the same, nor had any of the other privileges therein provided been availed of by any of the parties interested therein.

[fol. 13] 11. On or about February 14, 1941, plaintiffs' claim for refund, Exhibit "A", was rejected in writing by the Collector of Internal Revenue for the Fourteenth District of New York on behalf of the defendant herein.

12. The instant suit was instituted by the service of a summons and complaint upon the defendant herein on or about March 27, 1942.

13. No part of the plaintiffs' said claim has been assigned or transferred and no part thereof has been repaid to the plaintiffs.

Dated: New York, N. Y., December —, 1942.

Bondy & Schloss, Attorneys for Plaintiffs; Mathias F. Correa, United States Attorney.

[fol. 14] EXHIBIT "A", ANNEXED TO FOREGOING STIPULATION OF FACTS

Form 843

Treasury Department, Internal Revenue Service

(Revised April, 1940)

Claim

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

(Stamped:) Received—Filed Jan. 22, 1941. Estate Tax. (Date received:) Jan. 14, 1941. Collector Int. Rev., 14th Dist. of N. Y. Collector's Stamp.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

X Refund of Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

[fol. 15] STATE OF NEW YORK,
County of New York, ss:

Name of taxpayer Beatrice L. Goldstone and Eugene L. Bondy, Executors of the Estate of Morris L. Goldstone

Business address 285 Madison Avenue New York City New York

Residence 41 Beach Avenue, Larchmont, New York, and 6 Brookdale Avenue, New Rochelle, New York, respectively.

The deponents being duly sworn according to law, depose and say that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Third District, New York.

2. Period (if for income tax, make separate form for each taxable year) from ....., 19 .. to ....., 19 ..

3. Character of assessment or tax Estate tax.

4. Amount of assessment, $30,053.49; dates of payment $13,423.52 on Dec. 4, 1940 and $19,426.18 on Dec. 18/40.

5. both payments included interest from 5/23/39.

6. Amount to be refunded (besides interest from May 23rd, 1939) $5,376.11.

7. Amount to be abated (not applicable to income or estate taxes)

8. The time within which this claim may be legally filed expires, under Section 910 of the Internal Revenue Code on December 18th, 1943.

[fol. 16] The deponent verily believes that this claim should be allowed for the following reasons:

(See Rider Attached)

(Attach Letter-size Sheets if Space Is Not Sufficient)

(Signed) Beatrice L. Goldstone, Eugene L. Bondy, Executors of the Estate of Morris L. Goldstone.

Sworn to and subscribed before me this 11th day of January, 1941. Bertram W. Felenstein, (Signature of Officer Administering Oath), Bertram W. Felenstein, Notary Public, N. Y. Co. No. 45, Reg. No. 1-F-6. Cert. filed in Bronx Co. No. 3, Reg. No. 3-F-41. Cert. filed in Kings Co. No. 3, Reg. No. 1025. Certificate filed in Westchester County. Commission expires March 30, 1941.

(Rider)

This amount sought to be recovered is the estate tax assessed in the Estate of Morris L. Goldstone who died February 23, 1938, a resident of Westchester County, New York, upon the theory that the proceeds of two contracts with the Equitable Life Assurance Society numbered 9,168,544 and 9,168,545 in the respective amounts of $6,193.97 and $18,987.73, constituted a part of the decedent's estate. The Executors assert the assessment was erroneously made and that these moneys were not a part of the decedent's estate. The grounds of the Executors' contention are:

[fol. 17] 1. That the total ownership and unrestricted beneficial interest in these contracts was the property not of

the decedent, but of his wife, Beatrice L. Goldstone, by the terms of both contracts from their inception;

2. That, by the terms of both contracts, the said Beatrice L. Goldstone had the unrestricted right at any time during the life of the decedent to exercise all powers with respect to both the said contracts, including the right to surrender either contract or both to the issuing company and cancel the same and receive and retain the full surrender value or consideration thereof;

3. That, at no time after the date of the issuance of the said contracts on June 28, 1933, did the decedent have any rights in either of the contracts or in their proceeds or any control over either of them;

4. That Beatrice L. Goldstone was at all times the owner and possessor of the contracts;

5. That they constituted no part of decedent's estate.

The Executors named above are still acting as Executors of the said Estate and file this claim as such.

EXHIBIT "B", ANNEXED TO FOREGOING STIPULATION OF FACTS

(Omitted pursuant to Stipulation)

EXHIBIT "C", ANNEXED TO FOREGOING STIPULATION OF FACTS

(Omitted pursuant to Stipulation)

[fol. 18] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil 17-456

[Same Title]

MINUTES OF HEARING

Before: Hon. Stephen W. Brennan, District Judge, New York, March 17, 1943; 10:30 o'clock a. m.

Appearances:

Bondy & Schloss, Esqs., Attorneys for the Plaintiff; Eugene L. Bondy, Esq., of Counsel. Mathias F. Correa, Esq., United States Attorney, for the Government; by Arnold C. Stream, Esq., Assistant U. S. Attorney.

Mr. Bondy: May I submit the pleadings to your Honor?

The Court: Yes. Gentlemen, you may proceed. As I understand it, the facts are going to be stipulated. You may make your record in any way you see fit.

Mr. Bondy: May I offer in evidence the stipulation of fact which has been signed by the District Attorney and by the attorneys for the plaintiff.

The Court: The clerk may mark the exhibit.

(Marked Plaintiff's Exhibit 1.)

[fol. 19] Mr. Bondy: Plaintiff's Exhibit 1 contains all of the facts which both sides consider essential to a decision of the issues, with one exception, and that is the amount. I understand that the District Attorney is willing to stipulate that the amount of the alleged refund as prayed for in Exhibit 1, attached to Exhibit 1, constituting part of Exhibit 1, is the correct amount.

In other words, that if there should be a decree for the plaintiff, the judgment for the plaintiff will be in the amount prayed for, is that correct?

Mr. Stream: Yes, that is correct.

The Court: Could I have the amount of that in the record so I won't be confused later on?

Mr. Bondy: Yes, sir. The amount is $5,376.11, besides interest from May 23, 1939.

Mr. Stream: That is right.

The Court: That is the original record?

Mr. Bondy: The original stipulation signed by both sides, and that is the record, if your Honor is willing to be content with that.

I think I can outline the point involved very briefly.

(Discussion off the record.)

Mr. Bondy: April 1st to file briefs?

The Court: You have exchanged briefs now, have you?

Mr. Bondy: Yes.

The Court: Reply briefs to be filed by April 1st.

Mr. Bondy: That is satisfactory.

The Court: That is satisfactory as far as the Court is concerned.

Mr. Stream: It may be well to file them several days in advance. You may be on your way back to Utica.

The Court: If I go home in the meantime, mail them to me at Utica.

[fol. 20] In United States District Court, Southern District of New York

[Same Title]

Appearances:

Bondy & Schloss, Attorneys for Plaintiff, 285 Madison Avenue, New York City. Hon. Mathias F. Correa, United States Attorney, United States Court House, New York City, Attorney for Defendant; Arnold C. Stream, Assistant United States Attorney, of Counsel.

Argued Mar. 17, 1943; Submitted April 1, 1943; Decided July 17, 1943. Brennan, Judge.

Opinion

The executors of the Estate of Morris L. Goldstone bring this action under the provisions of the Internal Revenue Code to recover $5376.11, being a portion of the federal estate tax assessed against and paid by the Estate of Morris L. Goldstone, deceased.

The facts are not in dispute and are contained in a stipulation duly executed and filed with the Clerk.

On June 29, 1933, upon the application of decedent, the Equitable Life Assurance Society of the United States

issued two contracts in the form of life insurance policies, one in the amount of $18,928.00, payable upon the death of Morris L. Goldstone, referred to therein as the "In-
[fol. 21] sured", to the Insured's wife, Beatrice L. Goldstone, if living, or in the event of her prior death to the two daughters of the Insured.

The second policy may be termed an "annuity contract" and provides for the semi-annual payment of $386.51, to the decedent, who is designated as the "Annuitant", during his lifetime, and upon his death for the payment to his wife, Beatrice L. Goldstone, if living, the sum of $6,071.46; or, in the event of her prior death to the two daughters of the Annuitant.

Both policies were re-written without substantial change within two months from the date of their original issue.

The consideration of the first policy was the single premium payment by the decedent of $14,357.08. The consideration for the issuance of the second policy was a single premium payment by the decedent of $12,142.92.

In the first policy Beatrice L. Goldstone is designated as the "Owner" and in the second policy she is designated as the "Purchaser".

The policies provide in substance that the rights of the Owner and Purchaser should pass to Morris L. Goldstone upon the death of Beatrice L. Goldstone, and should the beneficiaries, his wife and two daughters, predecease him, then the benefits accruing upon his death should be paid to his estate.

In both policies the rights to receive dividends, surrender the policies, change beneficiaries, sign and pledge the contracts, were vested in the "Owner" or "Purchaser", during her lifetime and upon her death were passed to the "Insured" or "Annuitant".

The policies were issued at the same time. Morris L. Goldstone was then about sixty-three years of age and no physical examination of the decedent preliminary to the issuance of the contracts was required.

[fol. 22] The controversy herein arises by reason of the inclusion of the proceeds of both policies in the taxable estate of the decedent and the levying of an estate tax thereon, which was paid under protest. Application for a refund was made and the application was denied.

Plaintiffs contend that the inclusion of the proceeds of the two policies in the gross estate of the decedent was

error, as each contract at its inception was complete in itself; the decedent held no property rights therein during his lifetime, and the beneficiary received no greater right or interest in the contracts by reason of his death.

The government contends that the issuance of the policy was an *inter vivos* transfer by the decedent to the beneficiary, "* * * intended to take effect in possession or enjoyment at or after his death", and therefore, taxable under the provisions of Section 302 (c) of the Revenue Act of 1926, as amended.

Both parties agree that the contracts created no insurance risk and that such contracts were not "insurance" within the meaning of the Internal Revenue Code, so that the provisions of Section 302 (g) referred to in the briefs may be discarded as inapplicable.

Helvering v. LeGierse, 312 U. S. 531

There remains only to be decided the question as to whether the tax was legally levied under the provision of 302 (c) of the Internal Revenue Act.

Plaintiffs urge that the total ownership and unrestricted beneficial interest in these contracts was the property of the wife, Beatrice L. Goldstone, and was not and never was the property of the decedent; and is, therefore, not taxable, and they cite a number of cases where the question of taxation turned upon a finding of at least one of the indicia of ownership in the decedent. They seek to distinguish the case of Helvering v. Hallock, 309 U. S. 106, upon the [fol. 23] ground that in the instant case there could be no "right of reverter" in the contracts or their proceeds, because there never was an ownership therein by the decedent, and, therefore, any title that the decedent might have received by reason of the prior death of his wife was a new title, and in no sense is the right of reverter applicable in this case.

The plaintiffs have placed too much importance upon the use of the word "reverter". Even if we assume it to be true that the decedent never had legal ownership of the contracts, none the less, he used the contracts as a media through which he transferred a part of his estate to certain beneficiaries, the full enjoyment of which was delayed until his death. Technically, the decedent may not have had a "right of reversion" in the insurance contracts, because of the absence of prior ownership therein, but he did own that

part of his estate which purchased the insurance contracts, and if any interest therein could come to him by reason of any contingency, then it comes squarely within the doctrine of Helvering v. Hallock, Supra.

The purpose and breadth of the applicable statute is concisely stated in Helvering v. Hallock, 309 U. S. 106 at 114:

> "They relied on the governing principle of Section 302 (c) that Congress meant to include in the gross estate *inter vivos* gifts 'which may be resorted to, as a substitute for a will, in making dispositions of property operative at death'."

Here were inter vivos gifts made in such a manner as to act as exact substitutes for a will, for, by the investment in or purchase of the insurance contracts, the donor provided for the transfer of about $25,000 of his estate to the natural objects of his bounty.

The defendant argues that the gift was of the policies, not of the purchase price or the amount payable at death, [fol. 24] but if we look beyond the "conveyancer's device" —and we are cautioned to look to substance, not form. Helvering v. Hallock, Supra—we find the policies were the means used to accomplish the transfer of a part of the estate of the decedent.

> "Obviously, the word "transfer" in the statute of the privilege which may constitutionally be taxed, cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It must, we think, at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another."
>
> *Chase National Bank* v. *United States*, 278 U. S. 327 at 337.

Was the transfer intended to take effect in possession or enjoyment at or after death? The "owner" or "purchaser" may have had possession and the legal ownership of the policies after their issuance, but she did not have the possession or enjoyment of the fund transferred by the *inter vivos* act. She could have obtained the possession and enjoyment of a part thereof by a surrender of the contracts during the lifetime of the decedent. But to argue that the

purpose of the investment was to provide a present fund for the beneficiary is to ignore the basic purpose of the investor. It was the death of the insured which completed the shifting of economic benefit of the property transferred.

> "The death of Mrs. Clise caused a shifting or the completion of a shifting of an economic benefit of property, which is the subject of a death tax. Chase Ntl. Bank v. United States, 278 U. S. 327, 338. 49 S. Ct. 126, 73 L. Ed. 405, 63 A. L. R. 388. We quote from [fol. 25] Klein v. United States, 283 U. S. 231, 234, 51 S. Ct. 398, 399 75 L. Ed. 996: 'It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effects its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed'."
>
> *Commissioner of Internal Revenue* v. *Clise*, 122 Fed. 2nd 998 at 1003.

The death of the "Insured" and "Annuitant", "• • • became the 'generatir source' of important and definite accessions to the property rights" of the beneficiary.

Tyler v. *United States*, 281 U. S. 497 at 504.

The plaintiffs confuse the requirement under Section 302-g of an indicia of ownership as a basis for taxation, with the elements necessary to find a taxable event under Section 302-c.

> "Section 302-c deals with property not technically passing at death but with interests theretofore created. The taxable event is a transfer *inter vivos*. But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment."
>
> *Helvering* v. *Hallock*, 309 U. S. 106 at 110-111.

The above case is authority for the taxing of the proceeds of the insurance policies under the provisions of Section 302-c upon the theory that the transfer was akin to a testamentary disposition, and that by reason of the language of the contracts, the decedent held in suspense the ultimate disposition of the property until the moment of his death.

[fol. 26] See also:

Helvering v. *LeGierse*, 312 U. S. 531;
Chase National Bank v. *United States*, 116 Fed. 2nd 625;
Comr. Internal Revenue v. *Washer*, 127 Fed. 2nd 446;
Comr. Internal Revenue v. *Flanders*, 111 Fed. 2nd 117;
Bailey v. *United States*, 31 Fed. Sup. 778;
Mearkles' Estate et al. v. *Comr. Internal Revenue*, 129 Fed. 2nd 386.

The complaint herein is dismissed.

Stephen W. Brennan, United States District Judge.

[fol. 27] In United States District Court, Southern District of New York

Civ. 17-456.

[Same Title]

Findings of Facts and Conclusions of Law—Filed August 5, 1943

The above-entitled action having come on for trial before the undersigned on the 17th day of March, 1943, and the proof of both parties having been adduced, and the plaintiffs having appeared by Bondy & Schloss, Esqs. (Eugene L. Bondy, Esq., of counsel), and the defendant having appeared by Mathias F. Correa, United States Attorney for the Southern District of New York (Arnold C. Stream, Assistant United States Attorney, of counsel), and the undersigned having filed an opinion on July 21, 1943, dismissing the complaint, I now make the following findings of fact and conclusions of law:

Findings of Fact

1. The facts contained in the stipulation dated December 29, 1942, and filed herein, are hereby incorporated herein and found as the facts in this action.

2. I further find that the amount of $5,376.11, with interest as set forth in the complaint, is the amount which would be payable to the plaintiffs by the defendant if the cause of action stated in the complaint were sustained.

CONCLUSIONS OF LAW

I. This Court has jurisdiction over the parties and subject matter of this action.

[fol. 28] II. All requirements that are conditions precedent to the institution of this action have been met.

III. The sum of $5,376.11, constituting a portion of the amount of federal estate tax and interest paid to the Collector of the Fourteenth Internal Revenue District of the State of New York upon an assessment against the Estate of Morris L. Goldstone, deceased, which is the sum sought to be recovered in this action, was properly assessed as estate taxes and collected from the plaintiffs in accordance with law.

Accordingly, I direct that judgment be entered in favor of the defendant herein, dismissing the complaint, together with the costs and disbursements of this action.

Dated, Albany, N. Y., August 4, 1943.

Stephen W. Brennan, U. S. D. J.

[File endorsement omitted.]

[fol. 29] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. 17-456

[Same Title]

JUDGMENT—Filed September 24, 1943

The issues in the above entitled action having duly come on for trial before Honorable Stephen W. Brennan, United States District Judge, without a jury, on the 17th day of March, 1943, and the plaintiffs having appeared by Bondy & Schloss, Esqs. (Eugene L. Bondy, Esq., of counsel), and the defendant having appeared by Mathias F. Correa, United States Attorney for the Southern District of New York (Arnold C. Stream, Assistant United States Attorney, of counsel), and the proof of both parties having been adduced, and the Court having filed an opinion on July 21,

1943 dismissing the complaint, and on August 4, 1943 having made its findings of fact and conclusions of law,

Now, on motion of James B. M. McNally, United States Attorney for the Southern District of New York, Attorney for the defendant, it is

Ordered, Adjudged and Decreed that the complaint herein be and the same hereby is dismissed on the merits, and that the United States of America recover of Beatrice L. Goldstone and Eugene L. Bondy, Executors of the Estate of Morris L. Goldstone, deceased, % Bondy & Schloss, Esqs., 285 Madison Avenue, Borough of Manhattan, City and State of New York, the plaintiffs herein, the sum of $20.00 costs as taxed, and that the defendant have execution therefor.

New York, N. Y., September 24th, 1943.

George J. H. Follmer, Clerk.

[fol. 30] In United States District Court, Southern District of New York

Civ. 17-456

[Same Title]

Notice of Appeal

Sirs:

Notice is Hereby Given that Beatrice L. Goldstone and Eugene L. Bondy, Executors of the Estate of Morris L. Goldstone, Deceased, the plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Second Circuit from the judgment entered in the above proceeding on the 24th day of September, 1943, and from each and every part thereof.

Dated: New York, September 27th, 1943.

Bondy & Schloss, Attorneys for Plaintiffs, Office & P. O. Address, 285 Madison Avenue, Borough of Manhattan, City of New York.

To: Clerk of the United States District Court for the Southern District of New York, James B. M. McNally, United States Attorney, Southern District of New York, Attorney for Defendant, United States Courthouse, Foley Square, New York City.

[fol. 31] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

DESIGNATION OF CONTENTS OF RECORD

SIRS:

Plaintiff-appellant hereby designates, pursuant to Rule LXXV of the Rules of Civil Procedure, the following portions of the record, proceedings and evidence to be contained in the record on appeal:

1. Statement pursuant to Rule 13.
2. Notice of Appeal.
3. Complaint.
4. Answer.
5. Stipulation of Facts.
6. Minutes of testimony.
7. Findings of fact and conclusions of law.

[fol. 32] 8. Judgment.

9. Opinion of Court below.

Dated: New York, N. Y., November 16, 1943.

Yours, etc., Bondy & Schloss, Attorneys for Plaintiff-Appellant, Office & P. O. Address, 285 Madison Avenue, Borough of Manhattan, City of New York.

To: James B. McNally, United States District Attorney, Southern District of New York, Attorney for Defendant, United States Courthouse, Foley Square, New York City.

George J. H. Follmer, Clerk of the United States District Court for the Southern District of New York.

[fol. 33] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Same Title]

STIPULATION RE EXHIBITS "B" AND "C", ANNEXED TO THE STIPULATION OF FACTS

It Is Hereby Agreed, with the appended consent of the Clerk of this Court, that Exhibits B and C annexed to the stipulation of facts, consisting of contracts of the Equi-

table Life Assurance Society of the United States, numbered 9,168,545 and 9,168,544 respectively, need not be printed as part of the record on appeal inasmuch as the greater part thereof is deemed to be irrelevant on the appeal, but that photostat copies of the same in triplicate shall be supplied to the Court and filed with the record as a part thereof.

Dated: New York, January 31st, 1944.

Bondy & Schloss, Attorneys for Plaintiffs-Appellants.

James B. M. McNally, Attorney for Defendant-Respondent.

[fol. 34] In United States District Court, Southern District of New York

[Same Title]

Stipulation as to Record

It Is Hereby Stipulated and Agreed that the foregoing is a true transcript of the record of the District Court in this case, as agreed on by the parties.

Dated: New York, February 17th, 1944.

Bondy & Schloss, Attorneys for Appellants. James B. M. McNally, United States Attorney.

[fol. 35] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 36] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1943

No. 358

Argued May 26, 1944. Decided August 11, 1944

BEATRICE L. GOLDSTONE and EUGENE L. BONDY, Executors of the Estate of Morris L. Goldstone, Deceased, Plaintiffs-Appellants,

v.

THE UNITED STATES OF AMERICA, Defendant-Appellee

Before L. Hand, Swan and Frank, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York

Action by executors of Morris L. Goldstone to recover an alleged overpayment of part of the federal estate tax paid by them. From a judgment dismissing the complaint after trial, the plaintiffs appeal. Judgment affirmed.

Bondy & Schloss, Attorneys for appellants; Eugene L. Bondy, of counsel.

James B. M. McNally, United States Attorney, for appellee; Marvin M. Notkins, Assistant United States Attorney, of counsel.

[fol. 37] SWAN, Circuit Judge:

The question presented by this appeal is whether the proceeds of two contracts, which matured upon the death of Morris L. Goldstone and were payable to his widow, were properly included as part of his gross estate under the provisions of section 302(c) of the Revenue Act of 1926, as amended, Int. Rev. Code § 811(c).

The facts are not in dispute. The decedent died testate on February 23, 1938. Nearly five years before, in June 1933, he had caused The Equitable Life Assurance Society of the United States to issue two contracts for which he paid sums aggregating $26,500. One contract insured his life in the sum of $18,928 payable upon his death to his wife Beatrice, or, in case of her prior death, to his two

daughters, or, if none of the named beneficiaries survived him, to his executors or administrators. The consideration for the issuance of this policy was a single premium of $14,357.08 paid by check of the decedent. This policy was issued without a physical examination of the "insured", who was then 63 years of age. In lieu of a physical examination he was required to purchase the second contract. This was an annuity contract. It provided for the semi-annual payment of $386.51 to the "annuitant", who was the decedent, during his life, and for the payment upon his death of $6,071.46 to his wife Beatrice, or, if she were not living, to his two daughters, or, if they also were dead, to his executors or administrators. The consideration for the annuity contract was a single premium payment of $12,142.92 made by the decedent. By the terms of each contract the wife had the power to assign it, to borrow money on it, to receive dividends, to change the beneficiaries, and to surrender the contract and obtain the surrender value thereof. If she should die before the "insured" or "annuitant", these powers passed to him. She survived her husband and had not alienated or surrendered either con-[fol. 38] tract. Under the contracts she was entitled to receive as beneficiary from Equitable Life Assurance Society the annuity death benefit of $6,071.46, the face value of the life policy, $18,928, and accumulated dividends of $182.24, a total of $25,181.70.

Upon the foregoing facts the Commissioner of Internal Revenue determined that the sums payable to the decedent's widow pursuant to the two contracts were includable in his estate for purposes of the estate tax. This increased by $5,376.11 a deficiency assessment which the executors paid. A claim for refund thereof having been rejected they brought the present suit and have appealed from an adverse judgment.

It is conceded that the two contracts must be considered together and, so considered, they imposed no insurance risk upon the promisor; hence section 302(g) of the Revenue Act of 1926, Int. Rev. Code § 811(g), relating to amounts receivable "as insurance under policies taken out by the decedent upon his own life" is inapplicable. *Helvering* v. *Le Gierse*, 312 U. S. 531. Both parties agree that the question is whether the proceeds of the contracts are taxable against the decedent's estate under section 302(c), Int. Rev.

Code 811(c), the material portions of which are printed in the margin.*

[fol. 39] The district court answered the question in the affirmative upon the authority of *Helvering* v. *Hallock*, 309 U. S. 106. That case, following *Klein* v. *United States*, 283 U. S. 231, held that trusts wherein the settlor retained a contingent reversionary interest terminating with his death should be included in the settlor's estate for taxation under § 302(c) because they were transfers "intended to take effect in possession or enjoyment at or after death". In *Chase National Bank* v. *United States*, 116 F. 2d 625, we applied the *Hallock* case to insurance proceeds where the insured had retained a possibility of reverter in the event of his beneficiary's predeceasing him, holding that when the death of the insured terminates rights of his estate to receive payment under the policy and fixes them unalterably in the beneficiary, the proceeds must be added to the insured's estate for taxation under § 302(g). A few months later the opinion in *Helvering* v. *Le Gierse*, *supra*, decided that the proceeds of a life policy issued under circumstances similar in general to those in the case at bar, were taxable against the decedent's estate as a transfer under § 302(c),

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* Sec. 811. Gross Estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property * * *

(c) *Transfers in Contemplation of, or Taking effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, * * * intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *"

and not as insurance under § 302(g). These authorities, read together, appear to control the case at bar. See also *Commissioner* v. *Washer*, 127 F. 2d 446 (C. C. A. 6), cert. den. 317 U. S. 653; *Mearkle's Estate* v. *Commissioner*, 129 F. 2d 386 (C. C. A. 3); *Commissioner* v. *Clise*, 122 F. 2d 998 (C. C. A. 9), cert. den. 315 U. S. 821.

The appellants urge, however, that the extensive powers conferred upon the wife by the contracts here under consideration distinguish their case from those above cited and compel an opposite result. It is true that none of the beneficiaries there had powers like those conferred upon the wife here. By surrendering the annuity contract at any time she could have gotten the same sum as though the annuitant had died; and by surrendering the life policy she could have obtained its surrender value, which at the [fol. 40] instant before the insured's death was only $5,072.71 less than the amount payable to her upon his death. It is argued that the wife should be regarded as unconditional owner of the contracts, or at least of so much of the proceeds as she might have drawn at will under them. But the argument does not convince us. The law of taxation, as set forth in the cases above cited, looks to the unrealized possibility of reverter and concludes that where a possibility of reverter remains, the transfer takes effect only upon death. The husband's death terminated all his rights and enlarged those of his wife. No part of the proceeds which the wife received came to her through the exercise of her powers under the contracts. At the moment of her husband's death the powers expired and became a nullity. *Cf. Johnson* v. *Snyder*, 142 N. E. 877 (Ind. App.); *Leaming* v. *Huffman*, 124 A. 704 (N. J. Ch.); *Supreme Colony United Order of Pilgrim Fathers* v. *Towne*, 89 A. 264 (Conn.). His death was the operative fact which matured the promisor's duty to pay "and became the 'generating source' of important and definite accessions to the property rights" of the wife. See *Tyler* v. *United States*, 281 U. S. 497, 504. If the powers are significant for any purpose, they merely add to the remoteness of the contingency upon which the *Hallock* doctrine depends. We agree with the Sixth Circuit that it is idle to differentiate the *Hallock* case on such ground because the Supreme Court "was in search of a guiding principle depending not upon illusive and subtle distinctions, but one which should be uniform and workable

in the application of the estate tax." *Commissioner* v. *Washer, supra,* at page 449.

The judgment is affirmed.

[fol. 41] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of August one thousand nine hundred and forty-four.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

BEATRICE L. GOLDSTONE, & ANO., as Executors, etc., Plaintiffs-Appellants,

v.

UNITED STATES, Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell Clerk, By A. Daniel Fusaro, Deputy Clerk.

[fol. 42] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Beatrice L. Goldstone, et al., etc., v. United States. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 28, 1944. Alexander M. Bell, Clerk.

[fol. 43] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 44] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 12, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 49,152. U. S. Circuit Court of Appeals, Second Circuit. Term No. 699. Beatrice L. Goldstone and Eugene L. Bondy, Executors of the Estate of Morris L. Goldstone, Deceased, Petitioners, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed November 24, 1944. Term No. 699, O. T. 1944.